

*199 Subject - Communications
C.R. Legislation*

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OGC REVIEW COMPLETED

27 September 1955

25X1A9A
MEMORANDUM FOR: [REDACTED]
SUBJECT : Meeting on Crypto Security Law

1. The following persons attended a meeting held in your office this morning to discuss section 798, 18 U.S.C., and our memorandum of 25 August:

25X1A9A [REDACTED] - OGC
OS
[REDACTED] OS
OCI
- TSS
25X1A9A as - C/TSS
on - PS/OS
- FI/STD
- Commo
- [REDACTED] 25X1A8A

25X1A9A 2. General conversation ensued. [REDACTED] was concerned with the application of the law to TSS matters and in particular thought it difficult or impossible to bring security writing supplies and equipment under the law.
25X1A9A [REDACTED] was particularly concerned, as were others, with the practical problem of advising persons as to who are "unauthorized persons". [REDACTED] of RI indicated a mechanism such as the stamp could be utilized by his office but that this would impose a considerable burden. [REDACTED] of Staff D was concerned that any attempt on the part of our Agency to "broaden" the law beyond Crypto and Comint as such (e.g., s/w), for which the law was enacted might thereby lessen its overall effectiveness. He also suggested that the law is primarily of interest to NSA and that we might want to defer to them or consult with them at an early stage.

3. Everyone seemed satisfied with the legal niceties of the matter and was appreciative of our idea in writing initially. I invited all concerned to respond to our memorandum in writing suggesting any points and raising any questions they desired so that we may consider any newly presented points and answer any questions that we can.

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28 June 1955

Memorandum Re The Application of Section 798, Title 18, U.S.Code

1. This memorandum is for the purpose of bringing to the attention of those concerned several points arising under Section 798, Title 18 of the U.S.Code, with the view to considering administrative measures which this Agency and perhaps other agencies within the intelligence committee or elsewhere in the Government should take in order to utilize Section 798 effectively.

2. The purpose of Section 798, which was originally enacted as P.L. 513 - 81st Congress, and is included in the Espionage chapter of Title 18, was stated in the title of P.L. 513 as follows:

"To enhance further the security of the United States by preventing disclosures of information concerning the cryptographic systems and the communication intelligence activities of the United States."

The substance of the Act, stated in sub-section (a) of Section 798, is that one commits an offense who knowingly and willingly:

"communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information -

(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government hereinafter referred to as CRYPTO;

(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes hereinafter referred to as CRYPTO devices and COMINT devices, respectively;

(3) concerning the communication intelligence activities of the United States or any foreign government hereinafter referred to as COMINT;

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(4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes [hereinafter referred to as COMINT] . . ."

Then follow several definitions, including:

"The term 'classified information' means information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution;

The terms 'code', 'cipher', and 'cryptographic system' include in their meanings, in addition to their usual meanings, any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance, or meanings of communications;

The term 'communication intelligence' means all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients;

The term 'unauthorized person' means any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States."

3. Classified Information.

(a) Section 798 affords greater protection (in its field) to the Government than do the other espionage laws (Sections 793 and 794 of Title 18) in that the intent of the accused is not significant, i.e., a mere passing, knowingly and willingly, of the information to an unauthorized person is an offense; the accused need not have an intention to harm the United States. Section 798 differs from Sections 793 and 794 also in the definition of the information, the passage of which involves an offense; the latter two involve "information respecting the national defense" and "information relating to the national defense", as contrasted with information which "is, for reasons of national security, specifically designated by a United States Government agency for limited or restricted dissemination or distribution". The former language was held by the Supreme Court of the United States, in Gorin v. U.S. 312 U.S. 19, 61 S. Ct. 428, to involve a question of fact, that is, the jury must determine whether the acts of the defendant "are connected with or related to the national defense" (61 S. Ct. 436). Thus, in prosecutions involving those sections

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it is necessary to prove connection with the national defense, a requirement which could be embarrassing if applied to information classified "for reasons of national security". In such cases the prosecution would have to submit to the court the very information (and presumably much more) which had been classified by an agency of the Government "for reasons of national security".

Although it is by no means free from doubt, it is believed that under Section 798 it would not be necessary to submit to the jury or to prove the question of whether the designated information was properly designated "for reasons of national security"; proof that the designation was made and that the agency involved asserts it was done "for reasons of national defense" should be all that is required. The information significant under Sections 793 and 794 is identified by a descriptive phrase and it may or may not be fact that particular information is within the descriptive phrase; someone's judgment (the jury's) must be exercised and opinion accepted as final on the point. Under Section 798 the information is significant if an act occurred, namely, if it has been designated a certain way by a United States Government agency for a certain reason. There is no question on which there could be varying opinions and which therefore would have to be submitted for the jury's opinion. However, a position contrary to this one may be argued. It may be contended that whether designation is in fact required "for reasons of national security" is a question of fact on which persons differ and on which a jury's determination is needed. But this interpretation is believed refuted by the fact that if it were accepted it would render the statute unenforceable in many cases, since the Government doubtless would not be able to introduce into evidence information to establish "reasons of national security". Since the plain intent of the statute is to establish offenses and punishment, an interpretation which would defeat that intent should be avoided.

(b) In order to utilize Section 798, how should the information be designated? It is doubted that a document classified as, say, SECRET, under E.O. 10501 and without additional restrictions or with additional restrictions having no relationship to Section 798, would be within the purview of the Act. We would be on safer grounds if we were to utilize a stamp bearing the language of the statute such as: "For reasons of national security, dissemination or distribution of this document is limited and restricted by the Central Intelligence Agency within the contemplation of Section 798, Title 18 of the U.S. Code".

4. Unauthorized Person.

A problem also arises with respect to the definition of "unauthorized person", namely a person or agency not authorized by the President or by the head of an agency designated by the President to engage in communication intelligence activities to receive CRYPTO or COMINT information. By NSCID No. 9, 29 December 1952, a number of agencies are designated as the only agencies authorized to engage in COMINT activities. Other agencies of the Government, however (for example, those represented on the USCSB under NSC 168, 20 October 1953), utilize telecommunications. To the extent, if any,

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that the activities of any of these agencies require the receipt of information involving CRYPTO, COMINT or CRYPTO or COMINT devices it would be necessary for the President or the head of one of the agencies designated by NSCID No. 9 to authorize that agency and its employees to receive such information.

5. DD/P Pouching System.

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The definitions of the terms "code", "cipher" and "cryptographic systems" (see paragraph 2 above) include "any method of secret writing and any mechanical or electrical device or method used for the purpose of disguising or concealing the contents, significance or meanings of communications".

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Office of General Counsel

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